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7
8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,) No. CR 07-559 JSW
11)
Plaintiff,) **DEFENDANT'S REPLY**
12) **MEMORANDUM IN SUPPORT OF**
13 v.) **MOTION TO SUPPRESS**
14) Date: October 25, 2007
MICHAEL YOUNG,) Time: 2:30 p.m.
15) Court: The Honorable Jeffrey S. White
16 Defendant.)
_____)

17 **INTRODUCTION**

18 The government's opposition incorporates a new claim that Mr. Young was "evicted"
19 from the Hilton hotel on the night in question. The evidence now before the Court indicates that
20 this justification for the unlawful search of Mr. Young's hotel room was created after the fact.
21 As such, Mr. Young moves this Court to grant his motion on the papers. In the event the Court
22 determines that further fact-finding is necessary, Mr. Young hereby requests an evidentiary
23 hearing in connection with the government's new "eviction" theory.

24 **STATEMENT OF FACTS**

25 The government now disputes Mr. Young's expectation of privacy in the hotel room at
26

1 issue, and claims that Mr. Young was “evicted” from his hotel room despite the evidence that; 1)
2 all his belongings remained in the hotel room; 2) he had not taken any steps to check out of the
3 hotel; 3) no stolen property or *per se* illegal material was found in Mr. Young’s room; and 4)
4 possession of a firearm is not grounds for eviction from the hotel, *according to Hilton’s own*
5 *policy*. See Exhibit 2A, Weapon Policy of Hilton, at 2-3, Section IVA 1-9.

6 This claim of “eviction” is asserted for the first time, absent evidentiary support, in the
7 Declaration of William Marweg, Director of Security at the Hilton Hotel. See Government
8 Opposition, Exhibit 2, at ¶ 16. The government submits no policy statement from Hilton
9 indicating that “guests suspected of committing a crime in the hotel should be evicted from the
10 hotel.” Nor was there firm evidence that Mr. Young had committed any crime at the time of the
11 search and seizure. None of the reports produced in initial discovery support the government’s
12 claim that Mr. Young was “evicted”; nor is there any declaration in the government’s opposition
13 from any manager of the hotel who claims to have the authority to evict guests. In sum, the
14 evidence before the Court indicates that Mr. Young was not evicted from room 13575 at the time
15 the firearm was seized, nor that there was any lawful cause for the hotel to terminate his rental
16 contract. Mr. Young maintained an expectation of privacy in the items located in room 13575 at
17 the time of the search and seizure.

18 The government also disputes that the warrantless second search of Mr. Young’s room
19 was conducted by security guards at the behest of police, despite undisputed evidence that the
20 search was conducted after Officer Koniaris “was informed [by his superior] that [he] could not
21 enter Young’s hotel room to search it but that Hilton security guards staff could enter a guest
22 room.” Gov. Oppn., Exhibit 4 ¶ 7. On the whole, Officer Koniaris’ declaration strengthens,
23 rather than weakens Mr. Young’s argument that the security guards should be considered state
24 actors for Fourth Amendment purposes in connection with the second search. As the
25 government’s arguments to the contrary do not fit the facts of this case, the evidence seized by
26 Officer Koniaris without a warrant must be suppressed.

ARGUMENT

I. MR. YOUNG MAINTAINED A REASONABLE EXPECTATION OF PRIVACY IN HILTON HOTEL ROOM 1-3575¹ THROUGHOUT THE SECOND SEARCH AND SEIZURE OF THE FIREARM

A. Mr. Young was not “Evicted” for Fourth Amendment Purposes

The government first argues that Mr. Young had no reasonable expectation of privacy in his hotel room at the time of the second search of his hotel room, and claims that Mr. Young was “evicted” because his room was placed on electronic lockdown. This claim is belied by several key facts. First, no one ever informed Mr. Young that he was “evicted” from his hotel room. Second, all of Mr. Young’s belongings remained in the hotel room. Third, Mr. Young was well within the rental period he had legitimately paid for to lease the hotel room. Fourth, in *none of the initial discovery reports* did any member of the Hilton hotel staff claim that Mr. Young was “evicted.” In contrast, Assistant Director of Security Dirk J. Carr writes “I had graveyard supervisor Hicks and Officer Aguilar went to 1-3572, 1-3575 [Young’s room] and 13576 to put the rooms on ELO, until we could figure out what belongs to what room.” Opening Motion, Exhibit D. The room was subsequently placed on ELO after the firearm was discovered, in accordance with Hilton Hotel policy. *See id.*; *see also* Gov. Oppn. at Exhibit 2A, p.2 (stating that in the event that a weapon is found in a guest room, the security staff should “E-key” the guest room for safety reasons and the guest should be told to remove the weapon and/or offered a secured location on the property to store the weapon). Hilton’s own policy belies the

¹ Without citation, the government argues that Mr. Young must specifically claim an expectation of privacy in the bag at issue in addition to claiming an expectation of privacy in the hotel room. Defense counsel has uncovered no caselaw that supports the government’s proposition. It belies common sense, for example, that a homeowner resident defendant need claim specific expectations of privacy in chests of drawers or closets within the home to have standing to contest the validity of a search of those areas. Moreover, here the bag itself was found in the hotel room, and its discovery is a fruit of the search. The bag itself, as well as its contents would need to be suppressed as a fruit of an unlawful search if Mr. Young is successful on this motion. As such, Mr. Young has validly claimed an expectation of privacy in the contents of the room, including the bags, the closets, and the drawers located therein.

1 government's contention that Mr. Young was "evicted" because a firearm was located in the
2 room. As its own policy explains, discovery of a firearm in a Hilton hotel room is **not** grounds
3 for eviction from hotel.

4 **B. The Cases Cited by the Government are Inapposite to the Instant Case**

5 The facts in this case are far different than any case cited by the government for the
6 proposition that Mr. Young's expectation of privacy was extinguished by the hotel staff. First, in
7 *United States v. Haddad*, 558 F.2d 968 (9th Cir. 1977), the Ninth Circuit simply found that a
8 defendant had no reasonable expectation of privacy with respect to a room from which he had
9 checked out of after informing the management that "he did not want any belongings he might
10 have left in the room." *Id.* at 975. Here, Mr. Young had not checked out; his belongings
11 remained in the room, and under all accounts he still reasonably believed he had a right to occupy
12 it at the time of the search. In *United States v. Dorais*, 241 F.3d 1124, (9th Cir. 2001), the Ninth
13 Circuit conducted an intensely fact-driven inquiry to determine that the defendant had overstayed
14 his rental period and thus, his expectation of privacy was extinguished at the time the hotel room
15 was searched. *Id.* at 1130. Here, Mr. Young was well within the rental period and the rule of
16 *Dorais* does not apply.

17 In *United States v. Bautista*, 362 F.3d 584 (9th Cir. 2004), the defendant had used a false
18 credit card to rent a hotel room. The manager asked the police to intervene to investigate the
19 matter, but there was no evidence of an eviction. In that case, the Court held that "the critical
20 determination is whether or not management had justifiably terminated Bautista's control of the
21 room through private acts of dominion" and focused on whether or not the hotel manager either
22 physically evicted the defendant or asked police to assist in an eviction. *Id.* at 590. The critical
23 issue to the Ninth Circuit was whether the hotel manager had developed *justifiable cause* to evict
24 Bautista. In that case, neither a report that the credit card used to rent the room was stolen, nor
25 police intervention were deemed sufficient evidence that the hotel had justifiable cause for an
26 eviction. *Id.* at 591. Here, as in *Bautista*, unconfirmed suspicions by the security staff that Mr.

1 Young had stolen items out of another room, coupled with a request for police intervention and a
 2 lock out consistent with firearm security policy that does not provide for eviction is not a
 3 sufficient showing that privacy rights of the occupant were extinguished.

4 Nor is *United States v. Cunag*, 386 F.3d 888 (9th Cir. 2004) “strikingly similar” to the
 5 instant case. In *Cunag*, the Ninth Circuit found that the defendant “procured this room through
 6 deliberate and calculated fraud.” *Id.* at 894. As such, the focus of that case was the fact that
 7 Cunag was unlawfully present in the room to begin with. *Id.* (“During the suppression hearing,
 8 through documentary evidence, declarations of the hotel manager, and cross examination of
 9 Cunag himself, the prosecution easily carried its burden to prove that Cunag was unlawfully in
 10 the room”). This finding of unlawful presence was key to the Court’s decision that Cunag’s
 11 expectation of privacy was extinguished. Once this was determined, the Court then turned to the
 12 second part of the test; management’s “justifiable affirmative steps” to repossess the room. *Id.* at
 13 895. In that case, the fact that the hotel locked Cunag out **and** registered a crime report with the
 14 police was sufficient **after** determining Cunag’s unlawful presence. *Id.* In contrast to *Cunag*,
 15 here Mr. Young procured the room through honest means. The subsequent electronic lockout of
 16 Mr. Young was not an eviction, and it was not characterized as an eviction by any party present
 17 at the Hilton hotel that evening.

18 **C. In the Instant Case, the Government Cannot Meet Either Part of the Two-**
 19 **Part Test Outlined in the Aforementioned Caselaw**

20 Apparent in the aforementioned caselaw is a two part test that has developed in the Ninth
 21 Circuit in connection with defendants’ expectation of privacy in leased hotel rooms. The first
 22 part of the test concerns the defendant’s lawful and timely occupancy of the room. In cases
 23 where the rental period has expired, such as *Dorais*, or where a hotel room is procured by fraud,
 24 such as *Cunag*, the Circuit has held that eviction by the hotel management was justifiable and
 25 lawful. Once this is determined, the Court moves to the second part of the analysis; whether or
 26 not management took sufficient affirmative steps to repossess the room. In this vein, efforts by

1 the management to lock a lessee out of a room is only “ the factor that *finally obliterates* any
2 cognizable expectation of privacy a lessee might have.” *Cunag*, 386 F.3d at 895 (citing *Dorais*,
3 241 F.3d at 1129)(emphasis omitted). In other words, “affirmative steps” taken by a hotel (such
4 as a lockout) *standing alone* do not suffice to eviscerate a tenant’s expectation of privacy in a
5 hotel room. Instead, the government must prove both 1.) unlawful and/or knowing expired
6 presence, and 2.) justifiable, affirmative steps taken to repossess the room. Here, the government
7 can prove neither.

8 As argued above in Section IA and the Statement of Facts, the government has not made
9 any showing of either unlawful or untimely presence in the hotel room on the part of Mr. Young.
10 He clearly registered the room in his own name, paid for the room lawfully, and was well within
11 the rental period. Nor has the government proven that any action on the part of Mr. Young that
12 justified an eviction, by virtue of the hotel’s own weapon policy. The government accordingly
13 cannot meet the first part of the *Cunag/Dorais* test. With respect to the second part of the test,
14 the government’s arguments with respect to the second part of the test are equally unavailing.
15 The government cited the lockout as the “justifiable affirmative steps” that were taken by Hilton
16 staff to repossess the hotel room. But the government’s own evidence from the night of August
17 5, 2007 does not suggest that the act of locking out Mr. Young was done with an intent or
18 purpose of evicting him. Mr. Young’s belongings were not removed from the room. Nor was
19 Mr. Young or Officer Koniaris informed that Mr. Young was evicted at any point. *See, e.g.*,
20 Gov. Oppn, Exhibit 4 at ¶7 (police officer involved in this case specifically refers to the hotel
21 room from which he seized the gun as “Young’s hotel room.”)

22 Interestingly, no individual other than the Director of Security, (Mr. Marweg) references
23 the alleged “eviction,” and Mr. Marweg was not physically present at the hotel that evening.
24 After interacting with the government, Mr. Marweg now submits a declaration claiming that Mr.
25 Young was “evicted” through vague statements about an alleged policy that provides for eviction
26 of individuals “suspected of committed a crime.” *See* Oppn, Exhibit 2 ¶ 16. This statement,

1 standing alone, cannot be accepted as credible evidence that Mr. Young was evicted from his
 2 hotel room, particularly given the notable absence of the alleged policy to which Mr. Marweg
 3 refers.

4 **II. THE SECOND SEARCH BY THE HILTON SECURITY GUARDS, CALCULATED TO ENABLE**
 5 **THE POLICE OFFICER TO AVOID THE FOURTH AMENDMENT, VIOLATED MR. YOUNG'S**
 6 **PRIVACY RIGHTS.**

7 **A. The Security Guards Were State Actors at the Time of the Second Search**

8 The two part test in the Ninth Circuit to determine whether private actors are “acting as a
 9 government instrument for Fourth Amendment purposes” is: “(1) whether the government knew
 10 of an acquiesced in the intrusive conduct; and (2) whether the party performing the search
 11 intended to assist law enforcement efforts or further his own ends.” *United States v. Reed*, 15
 12 F.3d 928, 931 (9th Cir. 1993) (citing *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982)).

13 Here, the government apparently concedes that the first part of the test weighs in favor of
 14 a finding that Carr and Hicks were operating as state actors during the second search. Officer
 15 Koniaris both knew of and acquiesced in the security guards’ second search of Mr. Young’s hotel
 16 room, as he was clearly standing outside of the room at the time of the search. Moreover, Officer
 17 Koniaris *admits* that he was specifically informed by his Sergeant that he “could not enter
 18 Young’s hotel room to search it but that Hilton security staff could enter a guest’s room.” Gov.
 19 Oppn., Exhibit 4 ¶ 7. Directly after that conversation, Koniaris had a conversation with the
 20 security guards that led to the second search – strong evidence that the officers conducted the
 21 second search in lieu of Koniaris because Koniaris believed that he could not. There is no better
 22 evidence that Koniaris enlisted the security guards to conduct a warrantless search on his behalf
 23 than this.

24 With respect to the second factor, the government claims that “Hicks and Carr were
 25 acting pursuant to Hilton’s policy for the disposal of weapons found in guests rooms.” Gov.
 26 Oppn at 12:12-13. Quite simply, this is a factual assertion devoid of evidentiary support. The
 declarations submitted from Hicks or Carr do not state the guards’ intent in connection with the

1 second search. *See* Gov. Oppn, Exhibits 1 and 3. Mr. Young accordingly moves to strike this
 2 factual assertion in the government's papers, as it is not supported by affidavit or declaration in
 3 accordance with Criminal Local Rule 47-2 (incorporating Civil Local Rule 7-5).

4 Absent actual evidence of the guards' intent, the government's assertions in this regard
 5 are baseless and contradict the remaining evidence cited above; namely the strong indication of
 6 the nexus between Officer Koniaris' discovery that "he couldn't search Young's hotel room" and
 7 the subsequent actions by the hotel guards. When the remaining evidence is considered,
 8 including the alignment between Officer Koniaris and the security guards that night, the actions
 9 of the security guards in connection with the second search meet the *Reed* test for state action.

10 **B. *Jacobsen* Does Not and Should Not Apply to Searches of Private Residences**

11 The government also argues that regardless of the characterization of the second search,
 12 the preceding private search by the security guards eviscerated Mr. Young's expectation of
 13 privacy in the hotel room. In support of this proposition, the government boldly asserts that "this
 14 case is controlled by *United States v. Jacobsen*, 466 U.S. 109 (1984)." Gov. Oppn. at 9:25.
 15 Importantly, the government misses a critical point; the Ninth Circuit has yet to extend the
 16 holding of *Jacobsen* to private residences, including hotel rooms. Indeed, the one Court of
 17 Appeals to consider this very issue flatly rejected the government's invitation to extend *Jacobsen*
 18 to cases in which a hotel employee conducted an initial search that was followed by a warrantless
 19 entry by police:

20 Unlike the package in *Jacobson*, however, which 'contained nothing but
 21 contraband', Allen's motel room was a temporary abode containing personal
 22 possessions. Allen had a legitimate and significant privacy interest in the contents
 23 of his motel room, and this privacy interest was not breached in its entirety merely
 24 because the motel manager viewed some of those contents. *Jacobsen*, which
 measured the scope of a private search of a mail package, the entire contents of
 which were obvious, is distinguishable on its facts; this Court is unwilling to
 extend the holding in *Jacobsen* to cases involving private searches of residences.

25 *United States v. Allen*, 106 F.3d 695, 699 (6th Cir. 1997). Some of the cases cited by the
 26 government are either inapposite, or do not involve searches of private residences. *See, e.g.,*

1 *United States v. Mithun*, 933 F.2d 631, 634 (8th Cir. 1991)(search of a car). The one private
 2 residence case cited by the government, *United States v. Miller*, 152 F.3d 813 (8th Cir. 1998)
 3 strictly limits the application of *Jacobsen* to private residence cases to only have effect “when the
 4 private search was reasonably foreseeable”, and notes that its holding is in conflict with the *Allen*
 5 decision from the Sixth Circuit. *Id.* at 816.

6 The government’s broad contention that *Jacobsen* applies to the instant case is incorrect;
 7 it appears that this issue is one of first impression in the Ninth Circuit. Mr. Young urges this
 8 Court to adopt the sound reasoning of the Sixth Circuit on this issue, and to decline to extend
 9 *Jacobsen* to cases involving the subsequent warrantless searches of private residences, including
 10 hotel rooms. Accordingly, the subsequent search by the security guards acting as proxy state
 11 agents violated Mr. Young’s Fourth Amendment rights.

12 **III. NO OTHER VALID EXCEPTION TO THE WARRANT REQUIREMENT EXISTS IN THIS CASE.**

13 **A. Plain View**

14 The government’s opposition grossly misconstrues the plain view doctrine by ignoring
 15 the fact that Officer Koniaris made a warrantless entry into a constitutionally protected area to
 16 seize evidence. The fact that Officer Koniaris was entitled to stand in the hallway and saw
 17 evidence “highly incriminating to Young” is of no import, because he had no lawful cause to
 18 enter the hotel room to effect the seizure. “Not only must the officer be located in a place from
 19 which the object can be plainly seen, but he or she *must also have a lawful right of access to the*
 20 *object itself.*” *Horton v. California*, 496 U.S. 128, 136 (1990)(citations omitted)(emphasis
 21 added).

22 Here, Officer Koniaris had no warrant and no lawful reason to enter the hotel room. The
 23 incriminating nature of the evidence and the probable cause calculus referenced by the
 24 government in its opposition is irrelevant to this determination. Plain view cannot, standing
 25 alone, justify a warrantless search absent exigent circumstances or another valid exception to the
 26 warrant requirement. *See Coolidge v. New Hampshire*, 403 U.S. 443, 468 (1971). The

1 government's argument on plain view is in direct contradiction with Supreme Court precedent,
2 and should be disregarded.

3 **B. Inevitable Discovery**

4 The government's final arguments in connection with the inevitable discovery doctrine
5 must fail, as they are based on pure speculation rather than solid fact. It is well established that
6 the means by which the hypothetical inevitable discovery would have occurred must parallel, not
7 follow, the primary illegality. *See United States v. Echegoyen*, 799 F.2d 1271, 1280, n. 7 (9th Cir.
8 1986). "This court has never applied the inevitable discovery doctrine so as to excuse the failure
9 to obtain a search warrant where the police had probable cause but simply failed to obtain a
10 warrant." *United States v. Mejia*, 69 F.3d 309, 320 (9th Cir. 1995). Absent the warrantless
11 second search and unlawful seizure of the firearm, as well as the unlawful seizure and detention
12 of Mr. Young, there is no evidence before the Court that this firearm would have been located in
13 an alternate, parallel investigation that did not involve the actors and players involved in the
14 second search of Mr. Young's hotel room.

15 Here, the government contends, (again absent factual support) that "it is inconceivable
16 that [the guards] would have given the gun back to Young once they believed that he had robbed
17 the room of a fellow guest." This statement belies the policy of the Hilton hotel with respect to
18 weapons and firearms, in which security is directed to provide a secure location for storing
19 firearms as a courtesy for its guests. Moreover, had the police not seized the firearm in question
20 on August 5, 2007, it is unclear that Mr. Young would not have simply retrieved the firearm from
21 security and left the hotel; or removed it in accordance with the gun policy and subsequently
22 returned to the hotel to sleep. The hotel could have questioned Mr. Young, and upon realizing he
23 did not possess any of the stolen items, allowed him to remain there absent the gun. In addition,
24 in contrast to the government's assertion, there was no evidence whatsoever at the time of the
25 search that the gun had a connection to unlawful activity. In sum, the only support the
26 government sets forth in connection with this theory is speculation, which does not carry the day.

1 The inevitable discovery doctrine does not cure the constitutional infirmities in this case.

2
3 **CONCLUSION**

4 For the aforementioned reasons, Mr. Young respectfully requests this Court to suppress
5 the fruits of the unlawful search and seizure on August 6, 2007, including the firearm and each of
6 his statements to police. Mr. Young respectfully requests the Court to grant the motion on the
7 papers. In the alternative, Mr. Young requests the Court to order an evidentiary hearing in the
8 event the Court determines that further factual findings are necessary.

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10 Dated: September 27, 2007

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12 Respectfully submitted,

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15 /S/

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